Supreme Court, U.S.
FILED
JUN. 6 1996
CLERK

(3)

No. 95-1651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SHEARSON LEHMAN BROTHERS, INC. f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC. f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.,
Petitioners,
v.
HUGHES, HUBBARD & REED,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc. (together "Shearson"), reply to the opposition to petition filed by the Respondent, Hughes, Hubbard & Reed ("HHR"):

Introduction

HHR's opposition is a study in misdirection. To avoid the issues, HHR goes to great lengths to couch the jurisdictional question as a mere factual dispute. HHR covers this diversionary tactic with merits arguments and insulting (and untrue) assertions that the Petitioners have distorted the record.

HHR's diversionary tactic, however, fails because HHR's purported factual dispute is transcended by a core element of the constitutional issue for this Court -- the role of the *merits* of Petitioners' claims in defining the due process boundaries of personal jurisdiction. HHR does not deny the basic jurisdictional facts as Shearson presents them. It rather disputes the ultimate merits of Shearson's claims arising from those facts. For example, HHR does not dispute that it advised Shearson about how to deal with the Texas oversale, but instead disputes that its advice caused the oversale and denies that HHR is liable for that incorrect advice. Likewise, HHR denies that it breached its fiduciary duty to Shearson by continuing to represent Houston Biotech when a conflict arose, but does not, and cannot, deny that (a) it did represent Houston Biotech and (2) there was at least a potential conflict and dispute between Shearson and Houston Biotech as to responsibility for the oversale.

By framing the case in terms of a dispute on the liability questions associated with the scope of HHR's engagement -- issues on the merits -- HHR simply avoids the *legal*, indeed *constitutional*, question of whether such merits

determinations have any place in a jurisdictional inquiry. While it is true that the trial court adopted much of HHR's version of the merits, the question presented here is whether the trial court should have addressed those merits at all in deciding its jurisdiction, and whether in doing so, the trial court improperly assessed the constitutional boundaries of its jurisdiction. The proper jurisdictional question is whether HHR had sufficient contacts with Texas to subject it to jurisdiction there for a determination of this dispute, not how the trial court would rule on the ultimate merits of the claims and defenses arising from those contacts.

Thus, there are two core issues for this Court's review and guidance:

(1) Should a trial court address the merits of a plaintiff's claims in determining whether it can constitutionally exercise jurisdiction over the defendant?

(2) Do the constitutional boundaries allow jurisdiction under the facts of this case?

HHR's opposition ignores the first issue entirely, and in doing so fails to address the jurisprudential importance of the second.

Significantly, the two issues are independent. This Court could address the relationship between the merits of an action and personal jurisdiction, while reserving discussion of whether there is jurisdiction under a proper analysis. In the alternative, this Court could accept all of HHR's purported fact disputes (whether merits-based or not) and address the important jurisdictional question that remains. In either event, this is an important case that should not be decided on the basis of ad hominem attacks by opposing counsel.

Jurisdiction does not depend upon a determination of the merits of Shearson's claims.

Try as it might, HHR cannot reduce Shearson's petition to a factual dispute. What HHR is really so stridently disputing is Shearson's version of the merits of its claims,[1] which should be decided by a jury, not an appellate or trial court relying on abbreviated proof. In fact, HHR's jurisdictional position, and the faulty decisions of the lower courts, rests on two *merits* rulings: (a) that HHR's task was limited to the initial registration, and (b) that HHR successfully completed that limited task (or at least that no failure by HHR to finish that work contributed to Shearson's damages).

The proper jurisdictional inquiry, however, is *not* what is the *answer* to these questions, but whether these *questions* are *sufficiently connected to Texas* that a Texas jury

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[1] HHR also tries to concoct a fact dispute using the insulting rhetorical device of asserting that Shearson's counsel has misstated the record, which is as false as it is insulting. For example, HHR asserts that Hutton hired Vinson & Elkins as local counsel in Texas. Opposition Brief at 6-7. Hutton actually hired HHR, and only HHR, to conduct the Blue Sky registration for Houston Biotech securities that Hutton was bringing to market. Vinson & Elkins was hired by, and represented, Houston Biotech. HHR's claim that Hutton hired Vinson & Elkins is unsupported, even by the affidavit cited by HHR in support of this distortion, which states only that Vinson & Elkins had some responsibility for the Texas registration, but not whom it represented.

HHR also argues that Shearson misrepresents the record by asserting that it did not successfully complete its work for Hutton, but refers to an abbreviated list of Shearson's record citations supporting that proposition.

Rather than succumb to HHR's diversion, the Court should see those fact questions as irrelevant to the jurisdictional analysis, assumable arguendo as HHR asserts. Moreover, whether HHR successfully completed its tasks in Texas is a merits question for the jury.

should answer them. The findings and opinions of the lower courts are replete with merits determinations, and it is those determinations, not a minimum contacts analysis, that governed their jurisdictional decisions.

To further obscure the issues on which review is sought HHR focuses on irrelevant facts. For example, HHR finds it merely fortuitous that the oversale occurred in Texas. Brief in Opposition at 8. That analysis is, however, entirely backward; it is irrelevant that HHR agreed to register Houston Biotech's securities in states other Texas. Shearson's claims relate solely to the Texas offering, and therefore, only HHR's contacts with the Texas offering are relevant to the jurisdictional analysis. HHR's preoccupation with the offering in other states is a "smokescreen." *See id.* at 6. HHR also emphasizes that its incorrect advice emanated from California, but where the legal work for the Texas registration originated was never important; HHR could have done the work at any of its offices, or Gordon Kanofsky, its lead lawyer, could have advised Hutton (later Shearson) from a vacation home. The only critical locus was, and is, Texas, where the securities were to be properly registered and where Shearson was subjected to the rescission order of the Texas State Securities Board. The location of Shearson's home office is likewise insignificant. Shearson, as did Hutton before it, operates from many offices around the world from which it could have functioned as underwriter.

The confusion engendered by the lower courts' and HHR's diversion into the merits demonstrates the importance of this Court's addressing the proper relation between the merits of a plaintiff's claims and jurisdiction over the defendant, a question never before addressed by this Court.

There is jurisdiction over Shearson's claims

The second major issue (comprising questions presented 1, 2, and 4) is whether there is jurisdiction over HHR in Texas arising from its advice to Shearson.

Ironically, this issue is best framed by putting HHR's insulting rhetoric aside and humoring all of its fact positions (merits-based and otherwise). HHR argues that an attorney is subject to suit only where he or she is licensed or where his or her advice originates. *See* Opposition at 8, 9, 17. In other words, since HHR did not act in Texas, it cannot be sued there.[2] In contrast, HHR, giving itself the benefit of all of its merits-derived limits on its representation of Shearson in Texas, sets out its version of Shearson's position as follows: "Stripped of its rhetoric, Shearson's position is that a nonresident attorney who gives incorrect legal advice (or, as in this case, allegedly fails to give complete advice) about the law of the forum state is amenable to a malpractice suit in that state, even when the client is not a resident of the forum either." That formulation would be correct with the addition that HHR knew Shearson was going to act, and did act, in the forum state on the advice provided. Given nothing more, HHR should be subject to the jurisdiction of the Texas courts.

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[2] HHR asserts in regards to the malpractice claim that "the scope of HH&R's engagement did not affect the jurisdictional issue because no HH&R act of omission that Shearson challenged took place in Texas." *Id.* at 8 n.11.

As to the breach of fiduciary duty claim, HHR likewise asserts that "whatever HH&R did or did not do in this regard occurred within California or in communications passing between New York and California and did not support jurisdiction in Texas." *Id.* at 9 n.12. This is untrue, of course; HHR breached its fiduciary duty to Shearson mainly through communications with its Texas client, Houston Biotech, although those communications did originate with HHR in California.

HHR's position is founded on a series of irrelevant cases, in which the defendant lawyer was hired to represent an out-of-state client on matters directed toward the lawyer's home state; the only contacts with the forum state (always the client's home) were the lawyer's communications with the client. HHR incorrectly extrudes from these factually limited cases a rule that lawyers can only be sued in the state in which they are licensed. The cases stand for no such thing. Certainly, Texas or any other state could prosecute out-of-state attorneys practicing without a license. *See* Tex. Gov. Code § 81.101 *et. seq.*

Admittedly, there are not a raft of reported cases of the kind involved here. That, however, confirms the importance of this matter. Traditionally, lawyers' practices were limited to the states in which they were licensed. As demonstrated by at least this matter, that situation is changing. In the last decade, national firms have emerged. Even more recently, communication abilities have advanced such that legal advice can be given from almost anywhere. In this case, HHR advised Shearson regarding the blue sky requirements of all 50 states, and in particular HHR sought to direct Shearson's activities in and towards Texas and the Texas State Securities Board. Although HHR may have called from California to New York to give its advice, Shearson could have relied on that advice only in and affecting Texas. The same line of cases relied upon by HHR, which generally discuss actions against providers of professional services "like a doctor or lawyer,"[3] recognize that such professionals should be subject to foreign jurisdictions when they purposefully direct their services there. For example, while a doctor is generally not subject to jurisdiction in another state solely because the doctor treats

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[3] HHR's Opposition at 17-18, *quoting Cambell v. Gasper*, 102 F.R.D. 159, 162 (D.Nev. 1984).

an out-of-state resident, a doctor who treats a patient by telephone or the mails is subject to jurisdiction wherever such advice is directed. *See Kennedy v. Freeman*, 919 F.2d 126, 129 (10th Cir. 1990) (Texas doctor who "purposefully direct[ed]" his activities towards Oklahoma by rendering his diagnosis to the plaintiff "in Oklahoma, through the mail, knowing its extreme significance and that it would be the basis of [the plaintiff's] further treatment there" was subject to jurisdiction in Oklahoma.); *McGee v. Riekhof*, 442 F.Supp. 1276 (D.Mont. 1978) (Utah ophthalmologist's telephone call to Montana advising a patient to return to work was a negligent act in Montana and subjected the defendant doctor to jurisdiction in Montana).

The same distinction should hold for attorneys: they should be subject to jurisdiction in states beyond their place of residence where they direct their incorrect advice and where they know their advice will have impact. The decision below ignores the existing and emerging legal and economic reality and establishes a precedent that would allow a lawyer to evade any jurisdiction by the clever use of a computer modem. When HHR first learned the Houston Biotech securities had been oversold in Texas, its *first concern* was that Texas might require the sales to Texas investors to be rescinded (FST at 503-04). Despite foreseeing that frightening possibility, HHR proceeded to advise Shearson without the slightest effort to ensure the accuracy of its advice concerning Texas law. Because of that lack of care and HHR's divided loyalties by representing Houston Biotech, the result was exactly as HHR had foreseen -- Texas required Shearson to rescind the sales of Houston Biotech securities to Texas investors.

Jurisdiction over Shearson's breach of fiduciary duty claims is even more clear. Apparently unable to respond to the jurisdictional basis for this claim, HHR simply ignores it. As explained in Shearson's petition, the jurisdictional connection to this claim is manifest: the breach of fiduciary duty arose out of HHR's voluntary representation of a Texas entity in regards to the registration in Texas of that entity's securities, the disclosure in Texas of Shearson's confidential communications, and HHR's efforts to ensure that Shearson, and not its Texas client or itself, bore the ill-effects of the HHR-caused Texas rescission, not to mention that HHR's breach of its fiduciary duties resulted in the rescission of the Texas offering.

Conclusion

While it is manifestly true that the lower courts faithfully recited the jurisdictional rubrics formulated by this Court, the standards thus far enunciated by this Court do not address the troublesome relation between the merits of a claim and the existence of personal jurisdiction, a gap that leaves room for error as in this case. And, as HHR admits, there is no rigid constitutional formula; rather "minimum contacts analysis has been refined by identifying recurring fact patterns and outlining guidelines for application of the due process test to these patterns." Opposition at 16. Particularly as narrowed by the lower courts' merits determinations, which are the real foundation for their rulings, not this Court's standard formulation, this action presents the unique question worthy of review -- can legal advice alone subject a lawyer to jurisdiction when it is understood that the client will act based on that advice in the forum state?

Petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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